No. 92-311

In the Supreme Court of the United States

OCTOBER TERM, 1992

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

RICHARD H. SCHAEFER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent's brief fails to analyze the language of the two statutes that control this case: Section 2412(d) of the Equal Access to Justice Act (EAJA), and Section 205(g) of the Social Security Act, 42 U.S.C. 405(g). Respondent first asserts (Br. 8) that this case is *only* about Section 2412(d) of the EAJA. That provision gauges the time for filing a fee application under the EAJA on the entry of a "final judgment" in any "civil action" for which the United States may be liable for its opponent's attorney's fees. 28 U.S.C. 2412(d)(1)(B). The EAJA goes on specifically to define what constitutes a "final judgment" in the "civil action": A judgment that is final and not appealable. 28 U.S.C. 2412(d)(2)(G). Thus, the plain language of Section 2412(d) makes clear that the obligation to file a fee

application depends on the existence of a judgment in a civil action that is no longer appealable.

This case accordingly cannot be resolved solely by reference to the EAJA. In fact, as this Court held in *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991)—another case dealing with Section 2412(d) in the context of a Social Security case—Section 405(g) is central to a proper resolution of this case. That is because the "civil action" that forms the basis for respondent's fee request was adjudicated under Section 405(g), and it is the "final judgment" in that civil action that triggers the EAJA filing period. This Court has already established that the "final judgment" in the type of civil action at issue here occurs when the case is remanded to the Secretary pursuant to sentence four of Section 405(g). *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990). As this Court observed in *Melkonyan*, it necessarily follows that "[i]n sentence four cases, the filing period [for EAJA applications] begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165. Respondent offers no persuasive reason to retreat from this statement in *Melkonyan*—which directly and unambiguously prescribes the answer to the question presented in this case.

1. Respondent's position comes down to the argument that Section 405(g) authorizes a district court in a sentence four case to remand the case to the Secretary while retaining jurisdiction to enter a final judgment after proceedings on remand have been completed. Resp. Br. 8, 11. If a district court cannot do this, respondent's position cannot possibly be squared with the language of the EAJA, because the 30-day filing period is unambiguously triggered by the entry of a judgment that is final and not appealable.

In *Melkonyan*, the Court concluded that Section 405(g) does not permit such hybrid remand orders:

> [I]n *Finkelstein* we analyzed § 405(g) sentence-by-sentence and identified two kinds of possible remands under the statute. While we did not state explicitly at that time that these were the *only* kinds of remands permitted under the statute, we do so today. * * * Congress' explicit delineation in § 405(g) regarding the circumstances under which remands are authorized leads us to conclude that it intended to limit the district court's authority to enter remand orders to these two types.

111 S. Ct. at 2164 (footnote omitted). "This reading of the statute," the Court stated, "is dictated by the plain language of § 405(g) and is supported by the legislative history." *Ibid.*[1]

[1] Respondent asserts (Br. 8) that we are "[s]eeking to capitalize on *Melkonyan*['s] dicta," but it is he who is seeking to evade *Melkonyan*'s holding. Although part of the holding of that case was of course that the EAJA filing period can be triggered only by the judgment of a court, see 111 S. Ct. at 2161-2162, the Court went on to state that it "must decide" whether either party was entitled to return to district court to obtain a judgment that would start the EAJA clock ticking. *Id.* at 2163. The Court ultimately determined that it was unclear whether the remand in that case was pursuant to sentence six, or whether the suit ended as the result of a voluntary dismissal under Fed. R. Civ. P. 41(a); the Court accordingly remanded for the lower courts to make that determination. 111 S. Ct. at 2165. The Court held, however, that if the remand was pursuant to sentence six, the Secretary was obliged to return to district court and the court could enter judgment at that time. *Ibid.* If the case "was not a sentence six remand," however, the Court noted that the plaintiff "would not be entitled to fees." *Id.* at 2166. Thus, there is no basis for respondent's assertion that the Court's discussion of the types of remand available in Section 405(g) actions was purely dictum; on the contrary, the discussion on which we rely was necessary to the Court's ultimate resolution of the case, and to its instructions to the lower courts regarding how the case should be resolved on remand.

Respondent nonetheless argues (Br. 11) that a district court can avoid the clear import of *Melkonyan* by remanding a case pursuant to sentence four without entering judgment in the case at the time of the remand. Respondent endorses (Br. 11) the Eighth Circuit's fiction that district courts remanding cases pursuant to sentence four implicitly intend to retain jurisdiction to enter a final judgment after the proceedings on remand are completed. Pet. App. 5a-6a. Putting aside the fact that there is no evidence of that intent here,[2] the notion that district courts have the *authority* to do so is squarely inconsistent both with the terms of Section 405(g) and with *Melkonyan* and *Finkelstein*.[3]

In *Melkonyan*, the Court unambiguously stated "that the District Court's remand authority is confined to those circumstances specifically defined in § 405(g)." 111 S. Ct. at 2165. The Court went on to state that "remand orders [in Section 405(g) cases] *must* either accompany a final judgment * * * in accordance with sentence four, or

[2] When the district court entered its April 4, 1989, order remanding respondent's case to the agency, it did not express any intention of retaining jurisdiction over the case. On the contrary, it marked the case "closed" on its docket sheet. See Pet. Br. 16-17 & n.11. Contrary to respondent's claim (Br. 37 n.11), the Secretary did not concede in the court of appeals that the district court evinced an intent to retain jurisdiction when it remanded respondent's case in 1989. What the Secretary said was that the district court's August 26, 1991, order (Pet. App. 9a-12a) finding jurisdiction and awarding fees in the wake of *Welter* v. *Sullivan*, 941 F.2d 674 (8th Cir. 1991) (*reprinted at* Pet. App. 3a-8a), endorsed the Eighth Circuit's legal fiction that district courts remanding pursuant to sentence four automatically intend to retain jurisdiction. See Gov't C.A. Reply Br. 4.

[3] As we noted in our opening brief (Pet. Br. 17 n.11), the Eighth Circuit's rule—that in every sentence four remand case the district court intends to retain jurisdiction to enter a judgment after proceedings on remand are completed—would mean that no sentence four remand could ever constitute an appealable final judgment, a result directly contrary to this Court's decision in *Finkelstein*.

conform with the requirements outlined by Congress in sentence six." *Ibid.* (emphasis added). Moreover, *Finkelstein* also makes clear that the language of Section 405(g) means what it says, and that sentence four therefore does not authorize a remand apart from the entry of judgment. There, the Court stated that sentence four "*directs* the entry of a final, appealable judgment even though that judgment may be accompanied by a remand order." 496 U.S. at 629 (emphasis added). The Court accordingly made clear that the *sine qua non* of district court action pursuant to sentence four is the entry of a judgment. *Ibid.* The plain language of the statute, along with this Court's decisions in *Finkelstein* and *Melkonyan*, all confirm that respondent has matters exactly backwards: Although sentence four gives district courts the *option* of remanding in addition to entering judgment, it does *not* give district courts the converse option—that of remanding *without* entering a final, appealable judgment.[4]

[4] Respondent (Br. 19) and his *amici* (Nat'l Org. of Social Security Claimants Br. 14-19; Legal Services of No. California, *et al.* Br. 14-19, 22-30) contend that our position in this case is driven by a desire to overrule this Court's decision in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989). They are mistaken. We do not believe that *Hudson* must be overruled for us to prevail here. As we argued in our opening brief (Pet. Br. 22-25), however, we do believe that this Court's decisions in *Finkelstein* and *Melkonyan* have limited the reach of *Hudson* to sentence six cases. The holding of *Hudson* applied "where a court orders a remand to the Secretary * * * and retains continuing jurisdiction over the case pending a decision from the Secretary which will determine the claimant's entitlement to benefits." 490 U.S. at 892. When *Hudson* was decided, neither this Court nor the lower courts had yet focused on the statutory distinction between sentence four and sentence six cases. *Finkelstein* and *Melkonyan* have since established, however, that the statute authorizes the district court to retain jurisdiction in the manner contemplated by *Hudson* only in sentence six cases, and we therefore submit that *Hudson* has been so limited. Respondent argues that it would "vitiate[]" *Hudson* to limit it to the "rare instances" in which cases are remanded pursuant to sentence six,

2. Respondent argues (Br. 7-8) that all this makes no difference, because the issue in this case is whether a remand order in a sentence four case is a "final judgment" for purposes of Section 2412(d)(1)(B) of the EAJA. He argues that it is irrelevant, for purposes of the EAJA, whether the remand order was a judgment or was appealable under Section 405(g). Respondent is wrong.

a. The EAJA provides that a fee application is due within 30 days of final judgment *in the civil action* for which fees are being sought. 28 U.S.C. 2412(d)(1)(B). And the EAJA also defines the term "final judgment" as a judgment that is not appealable. 28 U.S.C. 2412(d)(2)(G). Under the plain terms of the EAJA, then, the timing of a fee application depends entirely on the existence of a judgment in the underlying civil action and on the appealability of *that* judgment. The terms of the statute therefore belie the distinction respondent seeks to draw between a "judgment" for purposes of the EAJA and for purposes of the underlying cause of action, and also belie the same distinction with respect to that judgment's appealability.[5]

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because "experience suggests that the vast majority of cases remanded under § 405(g) are remanded under sentence four." Br. 21. We do not doubt that sentence four remands are more common than sentence six remands. In our view, however, that relationship cuts against petitioner, for this Court has unanimously characterized *Hudson* as applying to a "narrow class" of cases where a court retains jurisdiction pending remand and the outcome of the civil action depends on the result of the proceedings on remand. *Melkonyan*, 111 S. Ct. at 2162; see also *Finkelstein*, 496 U.S. at 629-631.

[5] Thus, we are puzzled by the Eighth Circuit's conclusory statement that "[a]s a matter of statutory construction and common sense," there is no reason "why an appealable 'final judgment' under § 405(g) must necessarily be a 'final judgment' for purposes of § 2412(d)(1)(B)." *Hafner* v. *Sullivan*, 972 F.2d 249, 252 n.3 (8th Cir. 1992). On the contrary, Section 2412(d)(2)(G) of the EAJA *defines* a final judgment, for purposes of the 30-day filing limit in Section 2412(d)(1)(B), as one that is "not appealable." And as *Finkelstein* and *Melkonyan* establish, a sentence four remand is a final judgment that is appealable. When that judgment is no longer appealable, the EAJA's 30-day clock starts to run.

Respondent also claims (Br. 9) that "this Court itself indicated in *Finkelstein*" that a sentence four remand does not constitute a final judgment for purposes of the EAJA. It is true that in *Finkelstein* the Court distinguished its year-old decision in *Hudson* by noting that the latter case involved the EAJA and not finality under Section 405(g). See 496 U.S. at 629-630. The Court noted, however, that *Hudson* was concerned with the definition of "any civil action" in the EAJA, and disclaimed the notion that *Hudson* dealt with appealability or the timing of when a fee application is due under the EAJA. *Ibid.*

b. Respondent argues (Br. 24-28) that the fact that the Secretary may appeal a sentence-four remand does not mean that a claimant may also do so, and that it is the claimant's right to appeal that should trigger the EAJA's filing requirements. That argument finds no support in the language of the EAJA or Section 405(g), and makes no sense in any event.

First, it is not at all clear that claimants may not appeal sentence four judgments in the same manner as the Secretary. Although *Finkelstein* did mention the practicalities involved, see 496 U.S. at 625, it did not state that the Secretary may appeal only in the limited circumstances in which there is a practical need. On the contrary, the Court noted that sentence eight of Section 405(g) categorically provides that the district court's action under sentence four is a "final judgment" and appealable as such under 28 U.S.C. 1291. 496 U.S. at 625. A final judgment is ordinarly appealable by any party that is aggrieved by it. The Court did not rely on the alternative "collateral order" theory advanced by the government, see 496 U.S. at 632 (Blackmun, J., concurring in the judgment), which would more evidently have afforded a right of appeal only to the Secretary.

Even if respondent is correct, however, that *Finkelstein* authorizes only the Secretary to appeal, that conclusion

does him no good. The language of Section 2412(d)(2)(G) does not limit its definition of "final judgment" to those judgments that were once appealable by the claimant but no longer are (after expiration of the time for taking an appeal). Respondent nonetheless urges (Br. 28) that the language should be read that way, "because the EAJA permits only *claimants*, not the government, to seek fees." If respondent were correct, however, that the EAJA's time period for filing a fee application should be triggered by one party's right to appeal a judgment, that party undoubtedly should be the Secretary. A claimant can get attorney's fees under the EAJA only if he has *won* his case—a situation in which he has no interest in an appeal, and no right to take one. In contrast, in situations where the Secretary has an incentive to appeal, the claimant has obtained a favorable ruling. If the EAJA's filing period is to be triggered by reference to the effect of the judgment at issue, it surely should be triggered by a judgment that is adverse to the Secretary, for it is only then that the question of attorney's fees might arise at all. Respondent's contrary rule—that the time begins to run at some undetermined point when a claimant could appeal, but has no incentive (and perhaps no right) to do so because he has been awarded benefits on remand—lacks anything to commend it.

c. Respondent argues (Br. 8-11) that the EAJA's timeliness requirement cannot mean what it says, because the statute also requires a party to state in his fee application that he is a prevailing party and to allege that the position of the United States was not substantially justified. 28 U.S.C. 2412(d)(1)(B). Contrary to respondent's suggestion, there is no inconsistency between requiring a party to file a fee application before his prevailing party status is finally determined and requiring the party to adhere to the EAJA's limitation on when a fee application must be filed. In fact, the opposite is true;

respondent's position would authorize courts to ignore, on an ad hoc and unpredictable basis, the EAJA's unqualified terms setting forth the time when all fee applications are due.

The EAJA applies across the spectrum of *all* litigation against the federal government; Social Security cases make up some, but not all, of the cases to which the EAJA applies. In establishing a generally applicable 30-day time limit on fee applications, Congress made the deliberate choice to key that time limit to a judgment in the action for which fees are sought. Congress also did not provide any exception to that requirement for Social Security cases in which a litigant's prevailing party status might not be finally determined until after the time period for filing a fee application has expired. Rather than seeking to harmonize the statute's language with the requirement that a fee applicant state he is a prevailing party, however, respondent insists that the plain language of the statute be jettisoned in favor of what he views as a more equitable reading.

Respondent's argument has left him in a dilemma. As we have argued, and as *Melkonyan* specifically recognized, the interplay of the language of the EAJA and sentence four of Section 405(g) requires that EAJA fee applications be filed at the time a case is remanded pursuant to sentence four. Moreover, this Court has found "it clear that * * * a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of EAJA" simply by gaining a remand. *Sullivan* v. *Hudson*, 490 U.S. at 887. See also *Finkelstein*, 496 U.S. at 630.[6] If respondent is correct that the EAJA does not

[6] For the most part, respondent does not question that rule, although he mentions (Br. 12 n.4) that, if he loses on the timeliness issue, simply obtaining a sentence four remand should qualify a party for prevailing party status. As we have noted (Pet. Br. 27 n.16), this case does not call for the Court to decide that issue. Respondent cites

permit a party to file a fee application until he can certify his prevailing party status, it is more logical to conclude that fees are simply not available in cases like his—because plaintiffs who secure only a remand are not prevailing parties—than to conclude that the statutory time limits can be disregarded.

Our view, in contrast, effectuates the EAJA's goal of awarding attorney's fees to parties who ultimately succeed on their underlying monetary claim, while at the same time respecting the time limits for fee applications set by the statute. Our interpretation is also consistent with Section 2412(d)(1)(B), because a person filing a fee application in a remanded case is fully able to state that he has met all the conditions of achieving prevailing party status to that date by succeeding in having the court set aside the Secretary's first decision denying benefits. Pet. Br. 25-28. And, unlike respondent's interpretation, our view seeks to accommodate the obligation "to give effect, if possible, to every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). See *Moskal* v. *United States*, 498 U.S. 103 (1990).

d. Respondent next argues (Br. 22-24) that, even if sentence four remands must accompany sentence four judgments, there was no appealable judgment in this case because the district court failed to enter judgment on a separate sheet of paper as required by Fed. R. Civ. P. 58, and the order was therefore not appealable under Fed. R. App. P. 4(a)(1). This argument is unpersuasive.

In *Finkelstein*, the Court noted that the order at issue there—which was a sentence four remand just like the one at issue in this case—was "unquestionably a 'judgment,' as it terminated the civil action challenging the Secretary's

(Br. 12 n.4) a number of district court decisions in support of his view. But, as this Court recognized in *Hudson*, 490 U.S. at 887, "the vast majority of the Courts of Appeals" have gone the other way. See also Pet. Br. 25 & n.15.

final determination that [the plaintiff] was not entitled to benefits, [and] set aside that determination." 496 U.S. at 625. The Court went on to reject the argument that the label the district court put on its remand order was of any consequence to the order's character as a final judgment: "It is true * * * that the district court did not caption its order as a 'judgment,' much less a 'final judgment.' The label used by the District Court of course cannot control the order's appealability." *Id.* at 628 n.7. So too here, and it is plain under the terms of the EAJA that a final appealable judgment triggers the obligation to file a fee application.[7]

Respondent's sole support for his argument is this Court's dictum in *United States* v. *Indrelunas*, 411 U.S. 216, 222 (1973), that the requirement of a separate judgment "must be mechanically applied in order to avoid * * * uncertainties as to the date on which judgment is entered." See Resp. Br. 23-25. From this, respondent urges (Br. 23) that there is an "absolute requirement" of a separate judgment, and that the absence of such a judgment means that the time for appeal from the original remand order in this case never began to run.

Respondent's reliance on *Indrelunas* is misplaced. This Court's decision in *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978), which respondent does not address, establishes that the failure to enter a Rule 58 judgment does not, as a categorical matter, render a judgment non-final or non-appealable. On the contrary, in that case the Court specifically "disavow[ed]", 435 U.S. at 386 n.7, the mechanical reading of the rule previously endorsed in *Indrelunas*, and relied on by respondent for the proposition that a

[7] Respondent argues that even though the remand order may be appealable, it is not a "judgment" unless it is entered on a separate sheet of paper pursuant to Rule 58. *Finkelstein* itself refutes that argument, for there the Court stated that the remand order was a final judgment for purposes of Section 405(g). 496 U.S. at 627-628.

separate judgment is a categorical requirement for an order to be final and appealable under the federal rules and 28 U.S.C. 1291.[8]

3. Apart from his strained reading of the relevant statutes, respondent's central submission (Br. 11-18) is simple: It makes more "practical sense" to wait for proceedings on remand to be completed before requiring a fee application under the EAJA to be filed. The answer to respondent's contention is equally straightforward: Congress has enacted statutory language that unambiguously requires fee applications to be filed within 30 days of the time a sentence four remand order becomes no longer appealable. If respondent and his *amici* are dissatisfied with that regime, their recourse lies solely with the legislative branch—neither the Secretary nor this Court possesses the authority to disregard the language of the EAJA or Section 405(g).

In any event, we believe respondent exaggerates the relative virtues of his system and the vices of the one actually enacted by Congress. We acknowledge that fee applications probably will be filed in most sentence four remand cases (even though they should be filed only where

[8] As we argued in our opening brief (Pet. Br. 19-20 & n.12), even if respondent's view of Rule 58 and Rule 4(a)(1) were correct, those rules could not authorize district courts to evade the clear terms of Section 405(g)—an Act of Congress delineating the terms under which courts have the authority to remand cases to the Secretary—simply by refusing to enter a judgment in conjunction with a sentence four remand. See Fed. R. Civ. P. 82; *Finley* v. *United States*, 490 U.S. 545, 553 n.6 (1989). Thus, even if respondent were correct (Br. 24) that district courts could "avoid[] the statute of limitations bar" established by Congress simply by failing to enter a separate judgment, such action would be contrary to law. In any event, on respondent's theory, the Secretary would have no duty to initiate proceedings on remand until a seperate document was issued, and the claimant's participation in proceedings on remand would waive any objection to the absence of such a document. See Pet. Br. 19n.12.

the Secretary's action was not substantially justified). We also acknowledge that some number of those applications will ultimately prove to be unnecessary if the claimant fails to receive benefits. The number of unnecessary applications, however, will be fewer than respondent would have this Court believe. In recent years about two-thirds of claimants have succeeded in obtaining benefits on remand, and fee applications in those cases will ordinarily be decided on the merits by the district court. See Social Security Admin., *Annual Report to Congress* 38 (1992) (1992 Report to Congress).[9]

Moreover, the burden involved in filing a typical fee application is not as great as respondent suggests. Br. 15. In this case, for example, respondent's attorney sought compensation for 18.30 hours of his time. See Pet. App. 17a-18a. It is an overstatement to say that the burden of compiling the "detailed contemporaneous time records," or that "an explanation of the compensable expenses incurred" necessary for filing the typical fee application is anything but ministerial.[10]

[9] In Fiscal Year 1991, a total of 2,526 cases were remanded to the agency, and claimants succeeded in getting benefits in 69% of those cases. 1992 Report to Congress 38. The Department of Health and Human Services' statistics regarding remands, however, have not heretofore distinguished between sentence four and sentence six remands. There is therefore no way to know how many of the 795 cases in which claimants were not awarded benefits involved sentence four cases (in which a previously filed fee application would have ended up being superfluous) and how many involved sentence six cases. In Fiscal Year 1990, a total of 4343 remands were ordered, and claimants succeeded in obtaining benefits in 63% of those cases on remand. *Ibid.*

[10] Respondent complains (Br. 15) that fee applicants must file "a comprehensive brief explaining why the Secretary's [position] was not substantially justified." Again, however, respondent's complaint is overstated. He offers no reason why district courts cannot defer the requirement of such a brief until after proceedings on remand are complete. And, in any event, in view of the fact that the civil action is terminated by the sentence four judgment—and the fact that the

Nor would it be unworkable for fee applicants to file protective applications that may be supplemented as necessary after proceedings on remand are complete.[11] Although respondent claims that these protective fee applications will clutter the district courts' dockets, the burden such applications will place on the district courts is not significant. A district court may simply hold such fee applications in abeyance until the parties inform it that the case requires some action.[12] And, under this regime, there is every reason to think that fee applications will be resolved promptly.[13] Claimants, of course, have every

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remand proceedings are non-adversarial and the government takes no position as to a claimant's entitlement to benefits in those proceedings, see *Hudson*, 490 U.S. at 891—the question of substantial justification in every sentence four case will relate solely to the pre-remand proceedings. Thus, there is no reason why a timely fee application cannot properly allege that the position of the United States was not substantially justified.

[11] Of course, if *Hudson* is limited to sentence six cases (as we submit it is), there would ordinarily be no occasion for a fee application following a sentence four remand to be updated at all after the remand proceedings are complete. The sole condition that the claimant would have to meet in order to have his fee application heard would be that he obtain benefits on remand and accordingly become a prevailing party.

[12] As respondent's *amicus* notes (Nat'l Org. of Social Sec. Claimants Br. 12), some districts have already adopted special procedures for dealing with Social Security cases. There is no reason why the courts cannot accommodate a system of protective fee applications that will be held in abeyance pending the outcome of remand proceedings.

[13] In fact, fee applicants will likely get their fees sooner if our view prevails. In neither case will any fee application be conclusively resolved until after the remand proceedings are complete. But if the terms of the statute are enforced as we urge, fee applications will be on file and ready to resolve immediately after the remand proceedings are finished. There will be no need to return to district court to obtain a superfluous (and unauthorized) judgment that would authorize the claimant to file an application; there will be no need to file a new fee application; and, most significantly, the applicant will have every

incentive promptly to return to district court to get that court to act on their pending fee applications.

In many respects, moreover, the regime established by Congress is *more* workable than respondent's. First, if the terms of the EAJA are enforced, a clear rule will be established that fee applications are due 30 days after a remand order is no longer appealable. Thus, there will be no ambiguity in determining the timeliness of an EAJA application.[14] Second, when a party has a pending fee application and later succeeds in obtaining benefits on remand, he has a clear incentive promptly to return to district court to seek his attorney's fees. Under respondent's rule, however, a party will have to file the post-remand record with the district court and seek a "final judgment" for EAJA purposes, even though the district court has already, by definition (see *Finkelstein*, 496 U.S. at 625-627), entered final judgment pursuant to sentence four, and even though there is nothing substantive left for the district court to adjudicate.[15] Moreover,

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incentive to return to district court immediately to seek to obtain his fees.

[14] Respondent and his *amici* argue that confusion will ensue regarding whether remands are pursuant to sentence four or sentence six. That concern, too, is overstated. In the first place, given the significance of the determination, district courts and litigants can ensure that the terms of a court's order leave no doubt as to the character of a remand; in our view, it would be appropriate for this Court to encourage district courts to do so. Moreover, Congress has established specific terms that a sentence six remand must meet, and all other remands must accompany a judgment pursuant to sentence four. See *Melkonyan*, 111 S. Ct. at 2163-2165.

[15] By its terms, Section 405(g) does not authorize the Secretary to bring an action for review of an administrative decision granting benefits. Thus, the post-remand proceedings respondent envisions in district court—in which the court supposedly will enter an additional judgment pursuant to Section 405(g)—by definition would have absolutely nothing to do with the Social Security Act. Indeed, if the claimant has succeeded in getting benefits and is satisfied with the

respondent has not pointed to any statutory requirement, or even authorization, for the Secretary to take the post-remand actions he contemplates.[16]

In the end, what is important is that a clear and workable rule be established, and that the rule be consistent with the language of the EAJA and Section 405(g). The rule we propose is practical; and, in fact, it will likely result in fees being awarded sooner and more efficiently to successful applicants. Moreover, there is nothing to respondent's assertion that requiring fee applications to be filed when a case is remanded to the agency lays "a trap for the unwary." Resp. Br. 17 (quoting H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 2, at 6 n.26 (1985)). On the contrary, our rule sets out a perfectly clear standard for when fee applications are due. The courts

administrative decision, there is no case or controversy for the district court to adjudicate apart from the application for attorney's fees under the EAJA. That statute, of course, does not create any independent cause of action, but instead depends on the presence of a distinct civil action.

[16] Respondent relies (Br. 5, 32, 37) on the Secretary's representation to the Third Circuit nine years ago that the government will file the post-remand record with district courts, see *Brown* v. *Secretary of Health & Human Services*, 747 F.2d 878 (1984), as demonstrating the workability and lawfulness of such a system. The government's concession in *Brown*, however, is insignificant. First, the fact that the government agreed then that it would follow respondent's proposed procedure does not speak at all to the question whether that procedure is required by the statute. Moreover, that representation was made at a time when neither the courts nor the Secretary distinguished between sentence four and sentence six remands; at that time, it was thought that the second clause of sentence six applied generally to remands under Section 405(g), and that district courts possessed the authority under sentence seven to review post-remand administrative proceedings. This Court's decision in *Finkelstein*, however, squarely rejected that reading of the statute, 496 U.S. at 626-627, and hence fatally undermined the premises of the Secretary's representation in *Brown* (which applied only in the Third Circuit, see 747 F.2d at 884).

have every right to expect that government appeals from sentence four remand orders will be filed in a timely manner, and there is no reason why the same should not be true for fee applicants in such cases. Finally, our rule, in contrast to respondent's, conforms with the language of the relevant statutes and with this Court's cases interpreting that language.

4. Respondent next urges (Br. 31-41) that even if the Court agrees with us on the merits—with the result that his fee application was late because it was filed more than a year after his case was remanded to the agency pursuant to sentence four—its ruling should not be applied retroactively to his case. We do not believe that the Court should resolve this issue, which was neither raised nor passed upon below. The appropriate course would be for the Court to remand the case to the court of appeals for it initially to consider respondent's non-retroactivity argument.

In any event, there is no merit to respondent's non-retroactivity submission. It is well established (and respondent does not dispute) that courts may not decline to apply jurisdictional rules retroactively. See *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379-380 (1981). The time limit for fee applications under the EAJA is jurisdictional in nature, and it is not subject to waiver. In *Welter*, the Eighth Circuit acknowledged as much, stating that courts "lack jurisdiction to consider * * * fee applications filed" outside the 30-day limit. Pet. App. 5a. In the past, other courts of appeals reached the same conclusion.[17] In contrast, respondent cites (Br. 39

[17] See, *e.g.*, *American Ass'n of Retired Persons* v. *EEOC*, 873 F.2d 402, 407 n.7 (D.C. Cir. 1989); *Dunn* v. *United States*, 775 F.2d 99, 103 (3d Cir. 1985); *Allen* v. *Secretary of HHS*, 781 F.2d 92, 94 (6th Cir. 1986); *Jabay* v. *Sullivan*, 920 F.2d 472, 473 (7th Cir. 1990); *Olson* v. *Norman*, 830 F.2d 811, 821 (8th Cir. 1987); *Myers* v. *Sullivan*, 916 F.2d 659, 666

n.13) only a few district court cases in support of his assertion that the EAJA's time limits are not jurisdictional.

Respondent also argues (Br. 38-39) that this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), undermined the basis for the uniform view of the courts of appeals that the 30-day filing period is jurisdictional. The Eighth Circuit's decision in *Welter*, however, post-dated *Irwin*, and that court did not question the continuing validity of the view that the EAJA's time limit on filing fee applications is jurisdictional. In our view, *Irwin* should not be viewed as having established that the limitations period in the EAJA is non-jurisdictional.

In *Irwin*, the Court held that 42 U.S.C. 2000e-16(c), which allows a federal employee to file a Title VII action in district court within 30 days of the administrative decision, is not jurisdictional, but rather is subject to equitable tolling in appropriate circumstances. 498 U.S. at 94-96. In the course of its discussion, the Court chose to state a "more general rule" that once Congress has waived the government's sovereign immunity, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. Thus, contrary to respondent's suggestion (Br. 38-39), the Court established in *Irwin* only a rebuttable presumption, not an

(11th Cir. 1990); *United States* v. *J.H.T., Inc.*, 872 F.2d 373, 375 (11th Cir. 1989); *Haitian Refugee Center, Inc.* v. *Meese*, 791 F.2d 1489, 1494 (11th Cir. 1986); *Beta Systems, Inc.* v. *United States*, 866 F.2d 1404, 1405 (Fed. Cir. 1989); *J.M.T. Mach. Co.* v. *United States*, 826 F.2d 1042, 1046-1047 (Fed. Cir. 1987); *Action on Smoking & Health* v. *CAB*, 724 F.2d 211, 225 (D.C. Cir. 1984); *Premachandra* v. *Mitts*, 753 F.2d 635, 642 n.10 (8th Cir. 1985); *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985).

absolute rule applicable to all statutes prescribing time limits for filing suits against the government.

The EAJA states in mandatory terms a condition on the United States' waiver of immunity—that a party "shall" file a fee application within 30 days of judgment. 28 U.S.C. 2412(d)(1)(B). And, unlike the statute at issue in *Irwin* —Title VII—the EAJA has no application in any context except for suits against the United States. The decision in *Irwin* rested in part on the notion that, because statutes of limitations are "customarily" not jurisdictional in "lawsuits between private litigants," *Irwin*, 498 U.S. at 95, the same conclusion in government litigation "is likely to be a realistic assessment of legislative intent." *Ibid.* EAJA litigation, however, by definition cannot take place between private parties, and there is therefore no basis for a similar assessment of legislative intent to permit modification of the express pre-conditions to suit established in that statute.[18] Thus,

[18] The legislative history of the EAJA indicates that Congress understood the EAJA's time limits to be jurisdictional in nature. As we argued in our opening brief (Pet. Br. 21 n.14), the Senate Report on the bill ultimately enacted as the 1985 EAJA amendments explained that the issue of when a "judgment" is deemed "final" under 28 U.S.C. 2412(d)(2)(B) "is important since the thirty-day deadline for filing the fee application is jurisdictional and cannot be waived." S. Rep. No. 856, 98th Cong., 2d Sess. 16 (1984). In addition, there was extensive hearing testimony to the same effect. See *Equal Access to Justice Act Amendments: Hearing on H.R. 5059 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 38 (1984) (Dep'ty Ass't Att'y Gen'l Kuhl) (when "final judgment" occurs is important because the "thirty-day deadline for filing the application is jurisdictional and cannot be waived"); *Reauthorization of Equal Access to Justice Act: Hearing Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 32 (1983) (statement of Ass't Att'y Gen'l McGrath) ("thirty-day deadline for filing the application is jurisdictional and cannot be waived by the government or even the court"); *id.* at 75 (quoting Small Business Legal

we submit that the major premise underlying the *Irwin* decision is not present here, and that the EAJA's mandatory time limit should continue to be viewed as jurisdictional.

* * * * *

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Defense Committee & D. Stewart, "The Equal Access to Justice Act: An Attorney's Handbook") ("it has been held that the 30-day requirement from time of final judgment is jurisdictional and may not be waived"); *Implementation of the Equal Access to Justice Act: Oversight Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 3, 5 (1982) (Ass't Att'y Gen'l McGrath) ("jurisdictional and cannot be waived"); *Equal Access to Justice: Hearing Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 14 (1987) (same).

It is true (see Resp. Br. 39) that the House Report that accompanied the bill that was ultimately signed did not address the issue specifically, as had the earlier Senate Report. But the House Report did note that fee petitions "must be filed" within 30 days of final judgment. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 7 (1985). See also H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 26 (1980) (EAJA "requires" filing within 30 days); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980) (party "must apply" within 30 days). There was no suggestion, moreover, that the time period was *not* jurisdictional in nature. That fact is significant because a number of courts of appeals had already held that the EAJA's filing periods are jurisdictional (see Pet. Br. 21 n.14) when Congress amended the EAJA in 1985. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 379-382 (1982). See also cases cited in note 17, *supra*.

Thus, the legislative history of the specific provision before the Court refutes *Irwin's* premise that treating time limits as non-jurisdictional "is likely to be a realistic assessment of legislative intent," 498 U.S. at 95. Exactly the contrary is true here.

Respectfully submitted.

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